

EMPLOYEE CATEGORIES

RCL 15 through RCL 28

15 General considerations

Definitions for terms such as exclusive representative, employee, professional, supervisor, labor organization are found in section 7103 of the Statute. In addition, section 7112 prohibits the inclusion in any bargaining unit of specific categories of employees (e.g., confidential, engaged in federal personnel work).

The Authority alone is empowered to determine bargaining unit eligibility. See *U.S. Small Business Administration (SBA)*, 32 FLRA 847 (1988), reconsideration granted 36 FLRA 155 (1990) (Authority reinstated the grievance due to the time delay and a final determination on the unit status in a clarification of unit proceeding).

The Authority makes such determinations based on testimony as to an employee's actual duties at the time of the hearing, rather than on duties that may exist in the future. See *Department of Housing and Urban Development, Washington, D.C.*, 35 FLRA 1249, 1256-1257 (1990). Evidence such as a position description for a position may be useful in making unit determinations, but is not controlling. The hearing addresses whether the incumbent is performing all work listed in the position description, or is performing other work not listed in the position description. Some cases involve special circumstances which are also addressed at the hearing.

Arbitrators are not empowered to decide unit eligibility: The responsibility for determining appropriate units under the Statute is the responsibility of the Authority. This responsibility may include the resolution of questions concerning the bargaining unit status of individuals. *SBA* at 853 citing *National Archives and Records Service, General Services Administration and Local 2578, American Federation of Government Employees, AFL-CIO*, 9 FLRA 381 (1982).

Employee recently placed in position: An employee who recently filled a position may be the subject of a petition to clarify the status of the position. Where an employee has recently been placed in a position, duties are considered to have been actually assigned where: (1) it has been demonstrated that, apart from a position description, an employee has been informed that he or she will be performing the duties; (2) the nature of the job clearly requires those duties, and (3) the employee is not

performing those duties at the time of the hearing solely because of lack of experience on the job. The Authority does not consider duties to have been actually assigned where: (1) the assignment of duties is speculative, because the nature of the job may change or the nature of the job does not require such duties; or (2) although duties may be included in a written position description, it is not clear that the duties actually will be assigned to the employee or that the employee has been informed that he or she will perform these duties. See *Department of the Interior, Bureau of Reclamation, Yuma, Arizona*, 37 FLRA 239 at 245 (1990).

Vacant positions: Generally, eligibility determinations will not be made for vacant positions. See *Department of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Colorado*, 6 FLRA 52 (1981). The Authority has carved out two exceptions in which it will decide the bargaining unit status of vacant positions.

1. Where the clarification of a position will decide if an individual has access to the negotiated grievance procedure, it is appropriate to clarify the position, even if it is vacant at the time of the hearing. See *HQ, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina (Fort Bragg)*, 34 FLRA 21 (1990).
2. The Authority extended its holding in *Fort Bragg* to include resolving a unit clarification petition concerning any vacant position when that unit determination is a collateral issue necessary to the resolution of a grievance at arbitration. *U.S. Department of Veterans Affairs (VA)*, 55 FLRA 781 (1999). Consistent with its holding in *Fort Bragg*, the Authority held that “the Regional Director shall determine the unit status of a vacant position when both parties agree or an arbitrator decides that the unit determination is necessary to the resolution of the grievance at arbitration. In such event, the grievance must be placed in abeyance pending a decision on a petition for clarification of unit.” *VA* at 784.

New positions: New employees are automatically included in an existing bargaining unit where their positions fall within the express terms of a bargaining certification and where their inclusion does not render the bargaining unit inappropriate. Often the positions are newly created. *Department of the Army, Headquarters, Fort Dix, Fort Dix, New Jersey (Fort Dix)*, 53 FLRA 287 (1997). See also *U.S. Department of the Air Force, Carswell Air Force Base, Texas*, 40 FLRA 221 (1991), *U.S. Department of Commerce, National Oceanic and Atmospheric*

Administration, National Marine Fisheries Service, Northeast Region, 24 FLRA 922 (1986). In *Division of Military and Naval Affairs, New York National Guard, Latham, New York, and Selfridge ANG, Michigan and Alaska National Guard (New York NG and Alaska NG)*, 56 FLRA 139 (2000), the Authority considered whether three employees who were separated from their National Guard technician positions and offered Title 5 competitive service provisions pursuant to 5 U.S.C. § 3329 were included in their respective bargaining units. The Authority found that the applicable unit descriptions were “sufficiently broad to include section 3329 employees.” *New York NG and Alaska NG* at 142.

Change in status of employees: If parties agree on inclusions and exclusions at an election agreement meeting, and the Regional Director approves an election agreement, those inclusions and exclusions are binding unless:

1. If ineligible - stay ineligible unless:
 - a) changed circumstances, *see Federal Trade Commission (FTC I)*, 15 FLRA 247 (1984) (the parties can show that the duties and functions of established positions or job classifications covered in such agreements have undergone meaningful changes after the unit was certified), or
 - b) positions were eligible in the first instance and constitute a residual unit. *See Federal Trade Commission (FTC II)*, 35 FLRA 576 (1990).
2. If eligible - stay eligible unless:
 - a) changed circumstances, or
 - b) position was ineligible in the first instance under 7112(b)(1) thru (7) statutory exclusions. *See U.S. Department of the Army, U.S. Army Law Enforcement Command Pacific, Fort Shafter, Hawaii*, 53 FLRA 1602 (1998) (the parties improperly agreed to include positions that were not in conformance with the Statute and were subject to statutory exclusions).

See HOG 51 for specific guidance on developing a record about this topic at hearing.

Additional references:

Department of Labor, Office of the Solicitor, Arlington Field Office, 37 FLRA 1371 (1990).

Veterans Administration Medical Center, Prescott, Arizona, 29 FLRA 1313 (1987) and cases cited therein.